



July 2, 2002

Mr. Scott A. Kelly
Deputy General Counsel
Texas A&M University
John B. Connally Building, 6th floor
601 Tarrow
College Station, Texas 77840-7896

OR2002-3603

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165120.

Texas A&M University (the “university”) received a request for the following information concerning the university’s RFP 02-0010:

1. Core item by volume.
2. Top 1000 items.
3. Boise’s pricing in excel spreadsheet format.
4. Boise’s proposal.
5. What method was used to determine score points.
6. The member names on the evaluation committee.

You inform us that the university is providing to the requestor information responsive to items two, five, and six, but state that the university does not have information responsive to items one and three. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Although you state that the university takes no position with respect to whether information responsive to item four might

be excepted from disclosure, you have notified Boise Cascade ("Boise") of the request for their information and invited Boise to submit arguments to this office.¹ Boise responded and contends that its proprietary information is excepted from disclosure pursuant to sections 552.104 and 552.110 of the Government Code. We have considered Boise's arguments and have reviewed the submitted information.

We first note that both the university and Boise point out that a portion of Boise's proposal is designated as being confidential and/or proprietary. Information may not be withheld from the public, however, simply because a person anticipated or requested confidentiality for the information in submitting it to the governmental body. *See Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d at 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld from the requestor.

We next address the applicability of section 552.104. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the university does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, Boise's proposal may not be withheld under section 552.104.

With regard to section 552.110, Boise argues that all information regarding Boise's pricing, rebate structure, and service strategies is proprietary and confidential information of Boise which is excepted under the commercial or financial branch of section 552.110. Section 552.110(b) requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

¹*See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

Upon review of the submitted information and the arguments submitted by Boise, we conclude that Boise has established that release of a portion of its proposal would result in substantial competitive harm to the company. We have marked the information in the submitted materials that may be withheld under section 552.110(b). In this regard, we do not believe that pricing information from a winning bid proposal is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors); 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under predecessor to section 552.110 and that pricing proposals are entitled to protection only during bid submission process); *see also* Gov't Code § 552.022(a)(3) (information in account, voucher, or contract relating to receipt or expenditure of public funds by governmental body is public information). Therefore, the university may not withhold the information relating to the final price charged to the university after discount.

We also note that the submitted information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that the individuals whose e-mail addresses are at issue have affirmatively consented to their release. Therefore, the university must withhold the e-mail addresses we have marked under section 552.137 (see blue flags).

To summarize, the university must withhold the information we have marked in the submitted materials under section 552.110(b). The marked e-mail addresses must be withheld under section 552.137. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325.

Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/sjh

Ref: ID# 165120

Enc. Submitted documents

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